

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 14 2005

CARLEY GRACIE, an individual; and
GRACIE USA, a California
corporation,

Plaintiffs-Appellants,

v.

RORION GRACIE; BRAJITSU, a
California corporation; W.O.W.
PROMOTIONS; and SEMAPHORE
ENTERTAINMENT GROUP,

Defendants-Appellees.

No. 04-15014

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

D.C. No. CV-94-04156-SC

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, Senior District Judge, Presiding

Argued and Submitted October 20, 2005
San Francisco, California

Before: TROTT, RYMER and PLAGER^{**}, Circuit Judges.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

^{**} The Honorable S. Jay Plager, Senior Circuit Judge, United States Court of Appeals for the Federal Circuit, sitting by designation.

The issue of attorneys' fees in this case is before us for the third time. On remand from our second decision, *Gracie v. Semaphore Entm't Group*, 52 Fed. Appx. 43 (9th Cir. 2002) ("*Gracie II*"), the district court awarded Appellees \$462,442.46 in attorneys' fees and costs. Reviewing the award of attorneys' fees for abuse of discretion, *Horphag Research Ltd. v. Pellegrini*, 337 F.3d 1036, 1042 (9th Cir. 2003), we affirm in part and refer the remaining issues to the Ninth Circuit Settlement Unit.

The district court did not abuse its discretion in finding that Appellants' Lanham Act Claims and non-Lanham Act claims were inextricably intertwined such that apportionment of fees is impossible. In accordance with our instructions in *Gracie II*, the district court properly considered whether the factual and legal bases of each non-Lanham Act claim were substantially identical to those of the Lanham Act claims as part of its analysis.

The district court did not abuse its discretion in making a 10% reduction of the total fee award to account for Appellants' successful defense against Appellees' trademark infringement counterclaim. As directed by this court in *Gracie II*, the district court adequately explained how it arrived at the 10% figure.

In its lodestar calculation, the district court did not abuse its discretion in determining that the rates charged by the law firm retained by Appellees were

reasonable, with the exception of the paralegal fees. The affidavit relied on by the district court gives an opinion only as to the reasonableness of the attorneys' rates; it does not discuss the rates charged for work performed by the paralegals.

Finally, the district court did not abuse its discretion in determining that the *Kerr* factors did not warrant an adjustment in the lodestar amount. *See Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975).

The remaining issues raised by Appellants are referred to the Settlement Unit in accordance with the order filed contemporaneously with this memorandum disposition.

AFFIRMED IN PART.